

A Paruvathy a/p Palany v Sathiaselalan a/l Govindasamy

HIGH COURT (JOHOR BAHRU) — ORIGINATING SUMMONS NO 24-918
OF 1998
ABDUL MALIK ISHAK J
16 NOVEMBER 1998

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Legal Profession — *Counsel acting as witness — Counsel for defendant affirmed affidavit — Possibility of being cross-examined by plaintiff — Whether counsel should be barred from representing defendant*

C

Civil Procedure — *Originating summons — Whether appropriate — Sufficient particulars to identify cause of action — Intitulement stated statutes relied upon — No application to set aside wholly or in part — Whether originating summons had to be accepted wholly — Whether plaintiff free to select Form 6 or Form 7*

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Civil Procedure — *Jurisdiction — Forum conveniens — Originating summons filed in Johor Bahru — Plaintiff residing in Johor Bahru — Delay in transferring case to Seremban — Whether Johor Bahru right forum to hear case — Whether delay prejudicial to plaintiff*

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The plaintiff applied by originating summons in encl 5 for the guardianship, care, control and custody of an infant boy to be given to her, and for maintenance of RM500 per month to be paid by the defendant to the plaintiff for the benefit of the infant. The plaintiff raised a preliminary objection that Mr T Rajagopal of Messrs T Rajagopal & Co should be barred from representing the defendant. This was because Mr T Rajagopal had deposed an affidavit to the effect that he was never instructed by the defendant to institute divorce proceedings against the plaintiff. This contradicted the affidavit of the plaintiff's father in which he deposed that Mr T Rajagopal had told him that the defendant had deposited the marriage certificate and other documents with him in order to institute divorce proceedings against the plaintiff. On the other hand,

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the defendant's preliminary objections were: (i) the originating summons filed by the plaintiff contravened O 7 r 3(1) of the Rules of the High Court 1980 ('the RHC') because it did not contain any details of the question on which the plaintiff was seeking the court's determination or direction, nor did it contain sufficient particulars to identify the plaintiff's cause of action in respect of the relief or remedy which she was claiming; (ii) the originating summons contravened O 7 r 2(1) of the RHC because it had not followed the correct form in

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that the plaintiff should have filed an originating summons requiring an appearance in Form 6 and not an originating summons which does not require an appearance in Form 7; and (iii) the proper and convenient forum to hear the originating summons would be the High Court of Seremban.

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Held, allowing the plaintiff's preliminary objection and dismissing the defendant's preliminary objections:

- (1) It was clear that Mr T Rajagopalau was personally involved in the whole episode. There was a possibility that Mr T Rajagopalau might be cross-examined on his affidavit, a prerogative of the plaintiff and exercisable by her at any time under O 38 r 2(3) of the RHC. Further, the court had a discretion to allow a party to cross-examine a deponent. Mr T Rajagopalau may end up as a witness for the defendant and he would be caught under r 28(a) of the Legal Profession (Practice and Etiquette) Rules 1978. When he affirmed the affidavit, he was no longer acting as counsel for the defendant but as a witness. Therefore, his law firm and his partners and legal assistants should be barred from representing the defendant. The plaintiff's preliminary objection was therefore allowed (see pp 159C, 160F-H, 162D and 163H); *Sykt Pengangkutan Sakti Sdn Bhd v Tan Joo Khing t/a as Bengkel Sen Tak* [1997] 5 MLJ 705 followed; *Saraswathy Devi a/p Nadchatiram v Vijayalakshmi Devi a/p Nadchatiram* [1998] 1 MLJ 89 distinguished. A
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- (2) The plaintiff rightly invoked the Guardianship of Infants Act 1961 as that Act was applicable to her. There was no reason to dismiss the plaintiff's application as it was filed by way of an originating summons. Looking at encl 5, a concise statement of the relief claimed in the proceedings begun by originating summons with sufficient particulars to identify the cause of action had been fulfilled by the plaintiff, thereby falling within the ambit of O 7 r 3(1) of the RHC. The intitlement of the originating summons clearly stated the statutes which it relied upon to move this court, and this did not warrant its dismissal. Further, according to r 102(1) of the Divorce and Matrimonial Proceedings Rules 1980, non-compliance with these rules or any rule of practice in force shall not render the proceedings void unless the court shall so order but the court may, on its own motion or on application of any party, set aside any proceedings wholly or in part as irregular or order amendment on such terms as may be just. Here, there was no application by the defendant to set aside encl 5 wholly or in part as irregular. Therefore, encl 5 had to be wholly accepted (see pp 167C-G and 168B-D); *Platinum Heights Sdn Bhd v Sun Mix Concrete Sdn Bhd* [1997] 1 MLJ 409 and *Dr Woo Kin Chong v Mary Ou Holdings Sdn Bhd* [1998] 2 MLJ 167 distinguished. D
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- (3) The originating summons was in regard to a proceeding relating to an infant boy and it was basically governed by O 84 of the RHC. Order 84 merely states that when there is no pending action in respect of an infant, any application must be made by way of an originating summons. It is totally silent on which type of originating summons that must be used. That being the case, the plaintiff was free to select either Form 6 or Form 7. Even if the court was wrong in holding that encl 5 did not contravene O 7 rr 2 and 3(1) of the RHC, the non-compliance can be said to be a mere irregularity curable by O 2 r 1 and O 92 r 4 of the RHC. The non-compliance by the plaintiff was a mere inadvertence and was not calculated to prejudice the defendant (see pp 168F-I, 169A and 170B). H
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- A** (4) The originating summons was filed in the Registry of the High Court in Johor Bahru. At the material time, the plaintiff and the infant were already residing in Johor Bahru and consequently, it was logical for the plaintiff to commence proceedings in the High Court of Johor Bahru. In the interest of the parties and for the ends of justice, bearing in mind the nature of the application, the
- B** High Court of Johor Bahru was the right forum to hear the originating summons. In any event, the defendant had yet to take the necessary steps under s 20 of the Courts of Judicature Act 1964 to transfer the case to the High Court of Seremban. The delay in the defendant's omission to transfer the case to the High
- C** Court of Seremban was prejudicial to the plaintiff's originating summons, bearing in mind the nature and urgency of that application. Any further delay would be extremely prejudicial to the infant (see pp 170D-E and 171C-E).

D [Bahasa Malaysia summary]

- Plaintif memohon melalui saman pemula dalam lampiran 5 supaya penjagaan, kawalan dan jagaan seorang budak lelaki diberikan kepadanya, dan untuk penyenggaraan sebanyak RM500 sebulan dibayar oleh defendan kepada plaintiff untuk manfaat budak tersebut.
- E** Plaintiff membangkitkan bantahan permulaan bahawa En T Rajagopal dari Tetuan T Rajagopal & Co harus dihalang daripada mewakili defendan. Ini adalah kerana En T Rajagopal mendeposkan affidavit dengan kesan bahawa beliau tidak pernah diarahkan oleh defendan supaya memulakan prosiding perceraian terhadap plaintiff. Ini menyangkal affidavit ayah plaintiff di mana ia telah mendeposkan bahawa En T Rajagopal telah memberitahunya bahawa defendan telah menyimpan sijil perkahwinan dan dokumen-dokumen lain dengannya bagi memulakan prosiding perceraian terhadap plaintiff. Sebaliknya, bantahan permulaan defendan adalah: (i) saman pemula yang difailkan oleh plaintiff melanggar A 7 k 3(1) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') kerana ia tidak mengandungi sebarang butir tentang persoalan yang mana plaintiff menghendaki penentuan atau arahan mahkamah, dan tidak pun mengandungi butir-butir yang mencukupi bagi mengecam kausa tindakan plaintiff berkaitan dengan relief atau remedi yang dituntutnya; (ii) saman pemula tersebut melanggar A 7 k 2(1) KMT kerana ia tidak mematuhi bentuk yang betul dalam ertikata plaintiff sepatutnya memfailkan saman pemula yang menghendaki kehadiran dalam Borang 6 dan bukannya saman pemula yang tidak menghendaki kehadiran dalam Borang 7; dan (iii) forum yang betul dan sesuai untuk mendengar saman pemula adalah Mahkamah Tinggi Seremban.
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I **Diputuskan**, membenarkan bantahan permulaan plaintiff dan menolak bantahan permulaan defendan:

- (1) Adalah nyata bahawa En T Rajagopal sendiri terlibat dalam peristiwa ini. Terdapat kemungkinan bahawa En T Rajagopal

mungkin akan diperiksa balas atas affidavitnya, suatu prerogatif
 plaintif dan boleh dilaksanakan olehnya pada bila-bila masa di
 bawah A 38 k 2(3) KMT. Seterusnya, mahkamah mempunyai
 budi bicara untuk membenarkan suatu pihak untuk memeriksa
 balas seorang saksi sumpah. Encik T Rajagopalu mungkin
 menjadi saksi untuk defendan dan beliau akan terperangkap di
 bawah k r 28(a) Kaedah-Kaedah Profesyen Undang-Undang
 (Amalan dan Etika) 1978. Apabila beliau mengikrarkan affidavit
 tersebut, beliau tidak lagi bertindak sebagai peguam defendan
 tetapi sebagai seorang saksi. Oleh itu, firma guaman beliau dan
 rakan kongsinya serta pembantu guamannya haruslah dihalang
 daripada mewakili defendan. Dengan itu, bantahan permulaan
 plaintif dibenarkan (lihat ms 159C, 160F–H, 162D dan 163H);
Sykt Pengangkutan Sakti Sdn Bhd v Tan Joo Khing t/a as Bengkel
Sen Tak [1997] 5 MLJ 705 diikuti; *Saraswathy Devi a/p*
Nadchatiram v Vijayalakshmi Devi a/p Nadchatiram [1998] 1 MLJ
 89 dibeza.

- (2) Plaintif telah menggunakan Akta Penjagaan Budak 1961 dengan
 betul kerana Akta tersebut terpakai kepadanya. Tiada sebab
 untuk menolak permohonan plaintif kerana ia difailkan melalui
 saman pemula. Dengan memperlihatkan lampiran 5, pernyataan
 ringkas lagi padat tentang relief yang dituntut dalam prosiding
 yang dimulakan dengan saman pemula dengan butir-butir yang
 mencukupi bagi mengecam kausa tindakan telah dipenuhi oleh
 plaintif, dengan itu dirangkumi oleh lingkungan A 7 k 3(1) KMT.
 Tajuk saman pemula jelas menyatakan statut-statut yang
 digunakannya untuk memohon kepada mahkamah, dan ini tidak
 mewajarkan penolakannya. Seterusnya, menurut k 102(1)
 Kaedah-Kaedah Prosiding Perceraian dan Perkahwinan 1980,
 ketidakpatuhan kaedah-kaedah ini atau mana-mana kaedah
 amalan yang berkuatkuasa tidak haruslah menyebabkan prosiding
 menjadi tak sah melainkan mahkamah memerintah demikian
 tetapi mahkamah boleh, atas usulnya sendiri atau permohonan
 oleh mana-mana pihak, mengetepikan apa-apa prosiding secara
 keseluruhan atau sebahagian daripadanya sebagai luar aturan atau
 memerintahkan pindaan atas terma yang adil. Di sini, tiada
 permohonan dibuat oleh defendan untuk mengetepikan lampiran
 secara keseluruhan atau sebahagian daripadanya sebagai luar
 aturan. Maka, keseluruhan lampiran 5 hendaklah diterima (lihat
 ms 167C–G dan 168B–D); *Platinum Heights Sdn Bhd v Sun Mix*
Concrete Sdn Bhd [1997] 1 MLJ 409 dan *Dr Woo Kin Chong v*
Mary Ou Holdings Sdn Bhd [1998] 2 MLJ 167 dibeza.
- (3) Saman pemula adalah berkenaan dengan prosiding berkaitan
 dengan seorang budak lelaki dan ia pada dasarnya dikuasai oleh
 A 84 KMT. Aturan 84 cuma menyatakan bahawa apabila tidak
 terdapat tindakan yang menunggu penyelesaian berkaitan dengan
 seorang budak, sebarang permohonan mestilah dibuat melalui
 saman pemula. Ia tidak menyebut jenis saman pemula yang mesti
 digunakan. Oleh yang demikian, plaintif bebas untuk memilih

- A** sama ada Borang 6 atau Borang 7. Jika pun mahkamah adalah salah dalam memutuskan bahawa lampiran 5 tidak melanggar A 7 kk 2 dan 3(1) KMT, ketidakpatuhan boleh dikatakan cumalah luar aturan yang boleh dipulihkan oleh A 2 k 1 dan A 92 k 4 KMT. Ketidakpatuhan oleh plaintif hanyalah kelalaian dan tidak dijangkakan untuk memudaratkan defendan (lihat ms *****).
- B** (4) Saman pemula tersebut telah difailkan di Pejabat Pendaftaran Mahkamah Tinggi Johor Bahru. Pada masa yang material, plaintif dan budak tersebut sudah pun menetap di Johor Bahru dan seterusnya, adalah logik untuk plaintif memulakan prosiding di Mahkamah Tinggi Johor Bahru. Demi kepentingan pihak-pihak
- C** dan bagi mencapai keadilan, dengan mengingati sifat permohonan, Mahkamah Tinggi Johor Bahru adalah forum yang betul untuk mendengar saman pemula tersebut. Bagaimanapun, defendan masih belum lagi mengambil langkah-langkah yang perlu di bawah s 20 Akta Mahkamah Kehakiman 1964 untuk memindahkan kes itu ke Mahkamah Tinggi Seremban.
- D** Kelewatan dalam peninggalan defendan untuk memindahkan kes ke Mahkamah Tinggi Seremban memudaratkan saman pemula plaintif, dengan mengingati sifat dan kepentingan permohonan tersebut. Sebarang kelewatan lanjut akan memudaratkan budak tersebut (lihat ms 170D–E dan 171C–E).]

E**Notes**

For a case on counsel acting as witness, see 9 *Mallal's Digest* (4th Ed, 1995 Reissue) para 1424.

For a case on whether originating summons was appropriate, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) para 3214.

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For a case on forum conveniens, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) para 2909.

Cases referred to**G**

American Express Bank Ltd v Mohamed Toufic Al-Ozeir & Anor [1995] 1 MLJ 160 (refd)

CHS, Re [1997] 3 MLJ 152 (refd)

Cheow Chew Khooon (t/a Cathay Hotel) v Abdul Johari bin Abdul Rahman [1995] 1 MLJ 457 (refd)

Chong Siew Choong v PP [1996] 5 MLJ 65 (refd)

H

Dr Woo Kin Chong v Mary Ou Holdings Sdn Bhd [1998] 2 MLJ 167 (distd)

Helen Ho Quee Neo v Lim Pui Heng [1974] 2 MLJ 51 (refd)

J & Anor v C & Ors [1970] AC 668 (refd)

Khor Cheng Wah v Sungai Way Leasing Sdn Bhd [1996] 1 MLJ 223 (refd)

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Leisure & Allied Industries Pty Ltd v Udaria Sdn Bhd [1980] 1 MLJ 189 (refd)

Lewis v James (1886) 32 Ch D 326 (refd)

- Malayan United Finance Bhd v Sun Chong Construction Sdn Bhd & Ors* [1995] 4 MLJ 741 (refd) **A**
- McGrath (Infants), Re* [1893] 1 Ch 143 (refd)
- Perbadanan Pembangunan Pulau Pinang v Chong Ah Yok* [1993] 2 CLJ 351 (refd)
- Platinum Heights Sdn Bhd v Sun Mix Concrete Sdn Bhd* [1997] 1 MLJ 409 (distd) **B**
- Punton & Anor v Ministry of Pensions and National Insurance* [1963] 1 All ER 275 (refd)
- R Saraswathy v R Palakrishnan* [1986] 2 MLJ 127 (refd)
- R v Secretary of State for India in Council & Ors, ex parte Ezekiel* [1941] 2 KB 169 (refd) **C**
- Rohana bte Ariffin v Universiti Sains Malaysia and another application* [1988] 2 MLJ 609 (refd)
- Saraswathy Devi a/p Nadchatiram v Vijayalakshmi Devi a/p Nadchatiram* [1998] 1 MLJ 89 (distd)
- Shea v Green* [1886] 2 TLR 533 (refd)
- Smith and Fawcett Ltd, Re* [1942] Ch 304 (refd) **D**
- Sova Sdn Bhd v Kasih Sayang Realty Sdn Bhd* [1988] 2 MLJ 268 (refd)
- Syarikat Pengangkutan Sakti Sdn Bhd v Tan Joo Khing (t/a Bengkel Sen Tak)* [1997] 5 MLJ 705 (folld)
- Tang Choon Keng Realty (Pte) Ltd & Ors v Tang Wee Cheng* [1992] 2 SLR 1114 (refd)
- V Solai v Mariayee* [1954] MLJ 256 (refd) **E**
- Wee Chow Yong t/a Viena Music Centre v Public Finance Bhd* [1989] 3 MLJ 508 (refd)

Legislation referred to

- Courts of Judicature 1964 s 20 **F**
- Divorce and Matrimonial Proceedings Rules 1980 r 102(1), (2)
- Guardianship of Infants Act 1961 ss 3, 5, 10, 11
- Guardianship of Minors Act 1971 s 1 [UK]
- Interpretation Act 1967 s 62
- Law Reform (Marriage and Divorce) Act 1976 ss 77, 88, 88(3), 93, 93(1) **G**
- Legal Profession (Practice and Etiquette) Rules 1978 rr 4, 5(a), 28(a)
- Married Women and Children (Maintenance) Act 1950 s 3
- Rules of the High Court 1980 O 7 rr 2(1), 3, 3(1), O 28 rr 2(1), 7, O 38 r 2(3), O 53 r 2(4), O 69 r 4(2), O 84, O 92 r 4, Forms 6, 7, 8, 8A **H**

Mathews George (Danaraj Mathews Jimmy & Sara) for the plaintiff.
CS Murtti (T Rajagopal & Co) for the defendant.

Abdul Malik Ishak J:

I

Introduction

This is an application in encl 5 for, inter alia, the guardianship, care, control and custody of a boy aged 1 year 8 months to be given to his natural mother

A with the natural father having reasonable access thereto. The natural mother is of course the present plaintiff while the natural father is the present defendant. Enclosure 5 too prays for maintenance of RM500.00 per month to be paid by the defendant to the plaintiff for the benefit of the boy with effect from the date of the order and thereafter from the 7th of each month. The plaintiff too seeks in encl 5 for the costs of the application to be borne by the defendant and payable to the plaintiff. Winslow J speaking for the Singapore's Court of Appeal in *Helen Ho Quee Neo v Lim Pui Heng* [1974] 2 MLJ 51, sets out the correct approach to be adopted in a custody matter as seen at pp 52 and 53 of the report:

C Thus, it is possible for one parent who is otherwise unimpeachable and is in a better financial position to provide the means for promoting its educational and material welfare to be given custody jointly (or separately) with the other whereas the other may be given care and control over it because it may be preferable in the child's interests that it should be placed in the latter's care in view of the greater devotion which the latter may be able to bestow. All the relevant facts and circumstances should be considered bearing in mind the paramount interests of the child even though no hard and fast rule can be laid down based on the sex of the parent or the child as to who should have its care and control and/or custody. In our view, the correct approach is summed up admirably by Harman LJ in *Re C(A) (an infant)* [1970] 1 All ER 311 as follows:

E 'I can see nothing wrong in the consideration of the law which the learned judge applied. He did not, I think, give too much weight to the father's position. He looked, as he should, at the whole background and considered where had the infant better be — and that is really the only question that the court has to ask. I do not at all agree with expressions of opinion which have fallen, perhaps per incuriam, from judges that a boy should, as a matter of principle, be with his father — just as much as I disagree with the other 'principle' which has altogether been abandoned, that a girl of under three should, as a matter of principle, be with her mother. Other things being equal, these things may be so, but there is no principle involved in either. They are merely considerations which may weigh with the judge where the scales are nicely balanced.'

G In our judgment, having considered all the facts, both disputed and otherwise, the proper order to make was to reverse the order for custody made by the judge and order that the appellant should have such custody, including care and control over the child and responsibility for its upbringing. This would ensure that during his tender years he would have the benefit of being brought up by his own mother as opposed to being brought up in a haphazard way by others to whom the respondent might feel disposed to entrust his upbringing.

H We considered that this change would not affect him adversely as the judge thought but that it would be to his decided advantage in his formative years to be with his mother in all the surrounding circumstances.

Preliminary objections

I Both parties, in an attempt to outwit one another, have raised preliminary objections. I will proceed to examine the preliminary objections raised by Mr Mathews George on behalf of the plaintiff. It is Mr Mathews George's stand and the brunt of his preliminary objections that:

- (1) Mr T Rajagopal is barred from representing the defendant; **A**
- (2) the law firm of Messrs T Rajagopal & Co should not appear on record as the solicitors for the defendant;
- (3) Mr CS Murti and all the other legal assistants and partners of Messrs T Rajagopal & Co should be barred from appearing or acting for the defendant in the present case;
- (4) that Mr CS Murti is barred from representing the defendant as counsel appointed by Messrs Syed, Arafat & Bukhari; and **B**
- (5) the defendant should be represented by another counsel from the law firm of Messrs Syed, Arafat & Bukhari.

and on the facts, I entirely agree with him and orders to that effect were made. I will now proceed to set out the reasons for this course of action. **C**

It seems that the preliminary objections arose because Mr T Rajagopal deposed an affidavit on 27 July 1998 as reflected in encl 12 to the effect that he was never instructed by the defendant to institute divorce proceedings against the plaintiff. The affidavit in encl 12 was filed purportedly to negate the plaintiff's averments in encl 9 at paras 37 to 40 which, inter alia, stated that the defendant had deposited the marriage certificate and other documents with Mr T Rajagopal for the purpose of instituting divorce proceedings. It was obvious that the determination of whether the defendant had in fact contemplated the divorce proceedings was of crucial importance as: **D**

- (1) it goes towards the credibility of the parties bearing in mind their respective averments; and **E**
- (2) it ascertains, in a way, the bona fide of the defendant in resisting the plaintiff's application on the pretext that the defendant still wants the plaintiff back and that he still loves her.

It must be borne in mind that Mr T Rajagopal's averments in encl 7 has been contradicted to a large extent by the affidavit of the plaintiff's father by the name of Palany a/l Arumugam as seen in encl 14 that was affirmed on 7 August 1998. In essence, the plaintiff's father deposed that Mr T Rajagopal had told him in no uncertain terms that the defendant had deposited the marriage certificate and other documents with him in order to institute divorce proceedings against his daughter. In the office of Mr T Rajagopal, the latter said to the plaintiff's father: **F**

This is madness, both are educated, why can't they sort things out and live a normal life. **G**

The plaintiff's father further deposed that Mr T Rajagopal had openly said the following words: **H**

- (a) I am the one who instructed Sathiaselan to send his mother and sister away so as not to have any misunderstanding between mother-in-law and daughter-in-law.
- (b) I am going to meet them tonight and have discussions. Also, if possible, to send them for counselling. **I**
- (c) If this fails, I have no choice but to proceed with the divorce proceedings or we settle things out of court.

- A The defendant took a stand that sided Mr T Rajagopalulu for in his affidavit in encl 10 that was affirmed on 25 July 1998, particularly paras 31.2 to 32.2, the defendant refuted the averments of the plaintiff and her father. Of significance to note would be the averment by the defendant in encl 10 to the effect that Mr T Rajagopalulu 'is a family friend and family lawyer'. Mr T Rajagopalulu too in encl 12 at para 6.2. deposed that the defendant's family 'is very close to him and that he frequents the defendant's house very often'.
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- C From the recital of the brief facts, it is crystal clear that Mr T Rajagopalulu is personally involved in the whole episode. There would be every possibility that Mr T Rajagopalulu might be cross-examined on his affidavit, a prerogative of the plaintiff and exercisable by her at any time. Order 38 r 2(3) of the Rules of the High Court 1980 ('the RHC') states as follows:

- D In any cause or matter begun by originating summons, originating motion or petition, and on any application made by summons or motion, evidence may be given by affidavit unless in the case of any such cause, matter or application any provision of these rules otherwise provides or the Court otherwise directs, but the Court may, on the application of any party, order the attendance for cross-examination of the person making any such affidavit, and where, after such an order has been made, the person in question does not attend, his affidavit shall not be used as evidence without the leave of the Court.

- E and the affidavit of Mr T Rajagopalulu may be allowed to be used in court even though the cross-examination is pending (*Lewis v James* (1886) 32 Ch D 326). Of pertinence to note would be the principle of law gleaned from the case of *Shea v Green* [1886] 2 TLR 533 which states that the court may refuse to act on an affidavit where the deponent cannot be cross-examined. Then there is the principle of law which states that where there is a question of motive or of good faith of a deponent, the court ought not to be asked to act without cross-examination (*Re Smith and Fawcett Ltd* [1942] Ch 304). The court certainly has a discretion to allow a party to cross-examine a deponent. Chan Sek Keong J in *Tang Choon Keng Realty (Pte) Ltd & Ors v Tang Wee Cheng* [1992] 2 SLR 1114 succinctly said at p 1142 of the report that '... in an action tried on affidavits a party who has sworn an affidavit may be subject to being cross-examined on it.' Salleh Abas FJ sitting in the High Court in the case of *Leisure & Allied Industries Pty Ltd v Udaria Sdn Bhd* [1980] 1 MLJ 189 aptly said on the issue of cross-examination at p 190 of the report:
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- H To allow or not to allow the respondent's application to cross-examine the appellant's witnesses upon their affidavits, I take it, is a matter of court's discretion. In appropriate circumstances, there is no reason why such application should be refused merely because the deponent is a foreigner living outside the jurisdiction (*Re Lucas* [1952] 1 All ER 102); 'otherwise foreigners would have an advantage' (*Strauss v Goldschmidt* 8 SLR 239). It is really a matter of common sense and an elementary legal principle that a party who swears an affidavit must be prepared to stand up to it by cross-examination unless the application to cross-examine him is without just cause vexatious or motivated by desire to delay the proceedings (*Allen v Allen* [1894] P 239).
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It was argued by Mr CS Murti for the defendant that the plaintiff has yet to file an application to cross-examine Mr T Rajagopal and the issue of whether the latter would become a witness was irrelevant. Mr Mathews George was more practical in his approach. It was his contention that Mr T Rajagopal should cease to act for the defendant in the wake of the objection advanced by the plaintiff and Mr T Rajagopal should not wait until an application to cross-examine him would be made. In the event the plaintiff files an application to cross-examine Mr T Rajagopal and the court accedes to that application, the latter may find himself in an awkward and embarrassing situation. Mr CS Murti contended that since encl 5 will be heard and disposed off by way of an affidavit evidence, the defendant had no choice but to introduce Mr T Rajagopal's affidavit in order to rebut the plaintiff's averments. Indeed, this move was not disputed at all by the plaintiff. It was the plaintiff's stand all along that having elected to enter the arena of battle by filing encl 12, Mr T Rajagopal and his legal assistants should have left the conduct of this case to another legal firm. An ostensible act of relinquishing the conduct of this case to another law firm but without a firm commitment thereto would run foul of rr 4 and 5(a) of the Legal Profession (Practice and Etiquette) Rules 1978. For convenience, these self-explanatory rules are now reproduced hereinunder:

4 No advocate and solicitor shall accept a brief in a case where he knows or has reason to believe that his own professional conduct is likely to be impugned.

5(a) No advocate and solicitor shall accept a brief if such acceptance renders or would render it difficult for him to maintain his professional independence or is incompatible with the best interest of the administration of justice.

Mr T Rajagopal may end up as a witness for the defendant and he would find himself caught under r 28(a) of the Legal Profession (Practice and Etiquette) Rules 1978 which states that an advocate and solicitor shall not appear in court or in chambers in any case in which he has reason to believe that he will be a witness in respect of a material and disputed question of fact, and if while appearing in a case it becomes apparent that he will be such a witness, he shall not continue to appear if he can retire without jeopardizing his client's interest. Now, when Mr T Rajagopal filed an affidavit in encl 12 to rebut the affidavit of the plaintiff in encl 9, he took a perilous course of action because at that point of time he wore a different headgear — that of a witness and not that of counsel for the defendant. It must have been apparent to Mr T Rajagopal that when he affirmed encl 12, he was no longer acting as counsel for the defendant. The plaintiff's father's further affidavit in encl 14 sealed the fate of Mr T Rajagopal once and for all. By that further affidavit in encl 14, the role of Mr T Rajagopal as a witness was further highlighted and emphasized. By way of an analogy, the case of *Syarikat Pengangkutan Sakti Sdn Bhd v Tan Joo Khing (t/a Bengkel Sen Tak)* [1997] 5 MLJ 705 should be referred to. There the issues were: (1) whether it was desirable for a solicitor to appear as a counsel in a trial when he was required to be a witness in the same trial on a material question of fact; (2) whether it was permissible for a legal assistant of a firm

- A to replace another colleague who will become a witness for the opposite party; (3) whether the law firm should remain on record as solicitors when one of its lawyers was required as a witness; (4) whether the court has the inherent power to refuse to permit a particular advocate and solicitor from appearing on behalf of a particular individual in a particular case; and (5)
- B whether the right of a particular individual to be represented by an advocate and solicitor of his own choice is absolute. The facts of *Syarikat Pengangkutan Sakti Sdn Bhd v Tan Joo Khing (t/a Bengkel Sen Tak)* may be stated as follows. The plaintiff engaged an advocate and solicitor, Mr Gana Muthusamy ('Mr Muthusamy'), for the purpose of getting back his motor van from the defendant's workshop when the latter had refused to return unless the plaintiff settled a sum of RM1,267. On the basis of that retainer,
- C Mr Muthusamy proceeded to the defendant's workshop accompanied by a representative from the plaintiff's company. At the defendant's workshop, Mr Muthusamy spoke to one Tan Joo Khing and tried to persuade him to release the motor van with an undertaking by the plaintiff to settle all the charges payable to the workshop but without prejudice to the right of the
- D plaintiff to litigate the matter in a court of law. However, the attempt by learned counsel failed. Subsequently, the law firm of Messrs Gana Muthusamy & Co served on the defendant a writ of summons indorsed with a statement of claim and a summons in chambers with two affidavits. At the hearing of the summons in chambers, counsel for the defendant raised a
- E preliminary objection to the effect that the law firm of Messrs Gana Muthusamy & Co should not appear on record as solicitors for the plaintiff since Mr Muthusamy would be called as a witness. Further, she also submitted that not only Mr Muthusamy ought not to appear for the plaintiff but the law firm as a whole, including the legal assistants, should not appear or act for the plaintiff, be it in chambers or in open court. In allowing the
- F preliminary objection and ordering the plaintiff to engage a new counsel, the court held as follows: (1) to allow the plaintiff's counsel or his legal assistant to appear in chambers or in open court when the former would be a witness in the case would simply mean flying in the face of clear words in s 94(3)(n) and (o) of the Legal Profession 1976. As advocates and solicitors, they should have due regard to their client's interests and must conduct themselves with decorum so as not to bring the legal profession into
- G disrepute. The law firm of Messrs Gana Muthusamy & Co would equally be infected and should not remain on record as solicitors for the plaintiff for the simple reason that Mr Muthusamy owned the firm; (2) when Mr Muthusamy visited the defendant's workshop and spoke to Tan Joo Khing,
- H he became a witness on material and disputed questions of fact. By virtue of r 28 (a) of the Legal Profession (Practice and Etiquette) Rules 1978, Mr Muthusamy should be barred from representing the plaintiff, be it in open court or in chambers, as he should not be allowed to be a witness for the defendant and counsel for the plaintiff at the same time. The court further held that the rules must be complied with for an orderly conduct of
- I litigation and to maintain and observe the standard of conduct required of members of this august profession. The courts have an inherent power and authority to refuse to permit a particular advocate and solicitor from

appearing on behalf of a particular individual in a particular case. Faced with this sanction, it would be a gross misconduct on the part of that particular advocate and solicitor to so appear. The right of a particular individual to be represented by an advocate and solicitor of his own choice is not absolute. It is the court that will determine that right (*R v Secretary of State for India in Council & Ors, ex parte Ezekiel* [1941] 2 KB 169); and (3) the position would also be the same if another legal assistant from the same firm is allowed to represent the case whether it is in chambers or in open court. To say that Mr Muthusamy would not be involved in the case at all is wrong. No doubt he would not appear in chambers and in open court for the case but indirectly he would be involved. He cannot conduct with decorum and avoid a conflict of interest situation if his legal assistant is allowed to represent the plaintiff in the present case, be it in chambers or in open court, since he owned the law firm and that law firm should not appear on record as solicitors.

Obviously on the strength of *Sykt Pengangkutan Sakti Sdn Bhd*, Mr T Rajagopal, his law firm and his partners and legal assistants should be barred from representing the defendant. In the face of the preliminary objection, a notice of change of solicitors was filed on 29 August 1998 as reflected in encl 15 and Messrs Syed, Arafat & Bukhari became the solicitors for the defendant replacing the law firm of Messrs T Rajagopal & Co. With this change of solicitors, the plaintiff's preliminary objections appear to be academic but Mr CS Murtti of Messrs T Rajagopal & Co was still bent on representing the defendant as counsel for the newly appointed legal firm of Messrs Syed, Arafat & Bukhari. This was the tactical ingenuity of Mr CS Murtti which should be nipped in the bud. In resolving the preliminary objections, I have kept in the forefront of my mind, the crucial words of s 11 of the Guardianship of Infants Act 1961:

The Court, or a Judge, in exercising the powers conferred by the Act, shall have regard primarily to the welfare of the infant and shall, where the infant has a parent or parents, consider the wishes of such parent or both of them, as the case may be.

The English equivalent would be s 1 of the Guardianship of Minors Act 1971 which states, inter alia, that 'the court shall regard the welfare of the minor as the first and paramount consideration' and Lord MacDermott explained these words in the case of *J & Anor v C & Ors* [1970] AC 668 at pp 710-711 in these words:

... it seems to me that they must mean more than the child's welfare is to be treated as the top item in a list of items relevant to the matter in question. I think that they connote a process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices, and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interest of the child's welfare as that term has now to be understood. That is the first consideration because it is of the first importance and the paramount consideration because it rules upon or determines the course to be followed.

Lindley LJ in *Re McGrath (Infants)* [1893] 1 Ch 143 at p 148 once said:

But the welfare of the child is not to be measured by money only, nor by physical comfort only. The word welfare must be taken in its widest sense.

- A The moral and religious welfare of the child must be considered as well as its physical well being. Nor can the ties of affection be disregarded.

Notwithstanding the fact that the welfare of the boy is of paramount importance and the preliminary objections can be said to be of secondary importance, yet this court is duty bound to consider the preliminary objections and make rulings thereto before proceeding with the merits of the whole case. The case of *Saraswathy Devi a/p Nadchatiram v Vijayalakshmi Devi a/p Nadchatiram* [1998] 1 MLJ 89, a decision of the Court of Appeal, is factually different from the present case. There it involved a solicitor who was entitled to a share in land from an arrangement of a family company which became involved in civil suits and the question that arose for determination was whether the solicitor should be restrained from acting for the family company. NH Chan JCA delivering the judgment of the Court of Appeal had this to say at pp 96 to 97 of the report:

- D A personal relationship between a solicitor and his client can only mean a relationship (meaning an association) which is personal between them. A working relationship between partners of a firm is not a personal relationship, so that a lawyer can always act for his firm. A sexual relationship between two people is a personal relationship. But a solicitor and client relationship is not a personal relationship. However, there would be a personal relationship between them if their association is something which is more than that of a professional one. There is nothing to suggest that the relationship between Saraswathy and her clients is anything but a professional one which is that of a solicitor and client relationship. There is no personal (meaning individual; private; one's own) relationship between Saraswathy and her kin which is outside that of a professional relationship of solicitor and client. Rule 3 of the Practice and Etiquette Rules does not prohibit a solicitor from acting for his client merely because he is related by blood to his client. For the prohibition to apply, the relationship must be that of a personal one, meaning an individual or a private relationship which is beyond that of a solicitor and client relationship.
- E
- F

Here, there was no material to show that Mr T Rajagopalu was related by blood to the defendant and consequently, it would be a fallacy to mechanically apply the case of *Saraswathy Devi a/p Nadchatiram v Vijayalakshmi Devi a/p Nadchatiram* to the present case. Mr T Rajagopalu's status as counsel for the defendant would immediately change once the plaintiff seeks to cross-examine him in the witness box. Must this court wait for that to happen? Certainly not. For the reasons adumbrated above, I allowed the plaintiff's preliminary objections with costs.

- H I will now proceed to examine the defendant's preliminary objections and they may be stated as follows:

- (a) the originating summons in encl 5 which was dated 10 June 1998 contravened O 7 r 3(1) of the RHC for the simple reason that it did not contain any details of the question on which the plaintiff was seeking the court's determination or direction nor did it contain sufficient particulars to identify the plaintiff's cause of action in respect of the relief or remedy which she was claiming;
- I
- (b) the originating summons in encl 5 contravened O 7 r 2(1) of the RHC; and

- (c) the proper and convenient forum to hear the originating summons in encl 5 would be the High Court of Seremban **A**

and for these reasons, so it was argued, the defendant's preliminary objections should be entertained and encl 5 be dismissed with costs. Order 7 r 3(1) of the RHC states as follows:

Every originating summons must include a statement of the questions on which the plaintiff seeks the determination or direction of the High Court or, as the case may be, a concise statement of the relief or remedy claimed in the proceedings begun by the originating summons with sufficient particulars to identify the cause or causes of action in respect of which the plaintiff claims that relief or remedy. **B**

while encl 5 is worded in this fashion: **C**

Di dalam Mahkamah Tinggi di Johor Bahru
dalam Negeri Johor, Malaysia
Saman Pemula No 24-918 tahun 1998

Di dalam perkara Hak Penjagaan dan Kanak Dhevasealan a/l Sathiassealan **D**
Dan

Di dalam perkara Aturan 84 Kaedah-Kaedah Mahkamah Tinggi 1980
Dan

Di dalam perkara seksyen 77, 88 dan 93 Akta Pembaharuan Undang-Undang **E**
(Perkahwinan dan Penceraian) 1976

Dan

Di dalam perkara seksyen 3, 5, 10 dan 11 Akta Penjagaan Kanak-Kanak 1961
(Akta 351)

Dan **F**

Di dalam perkara seksyen 3 Akta Perempuan Berkahwin dan Kanak-Kanak
(Nafkah) 1950 (Dipinda 1981)

Antara

Paruvathy a/p Palany **G**

... Plaintiff

Dan

Sathiassealan a/l Govindasamy

... Defendan **H**

Saman Pemula

Benarkan defendan hadir di depan hakim (1) di dalam kamar pada 8 Julai 1998 pada jam 9 pagi/petang untuk mendengar permohonan plaintif untuk perintah-perintah: **I**

- (a) Bahawa hak penjagaan (guardianship) dan hak pemeliharaan (care), penguasaan (control) dan jagaan (custody) ke atas kanak-kanak Dhevasealan a/l Sathiassealan satu tahun lapan bulan diberikan kepada

- A** plaintif dengan akses kepada defendan pada hari Sabtu dan Ahad dari pukul 8 pagi hingga 6 petang di rumah plaintif.
- (b) Bahawa defendan membayar kepada plaintif wang sejumlah RM500 sebulan sebagai nafkah kepada kanak tersebut dari tarikh perintah ini dan seterusnya pada atau sebelum 7hb tiap-tiap bulan.
- B** (c) Bahawa kos permohonan ini ditanggung dan dibayar oleh defendan kepada plaintif.
- (d) Lain-lain relief yang difikirkan wajar dan adil diberikan oleh mahkamah yang mulia ini.
- Bertarikh pada 10 Jun 1998.
- C** Sgd (Illegible)
Penolong Kanan Pendaftar,
Mahkamah Tinggi,
Johor Bahru.
- Memorandum untuk diindorskan ke atas saman.
- D** Saman ini telah dikeluarkan oleh Tetuan Danaraj Mathews Jimmy & Sara, Peguambela & Peguamcara yang beralamat di Suite 05-07, Level 5, Wisma Maria, Jalan Ngee Heng, 80100 Johor Bahru.
- (No Rujukan: DMJS/JB 453/98 FAM/MG/y).
- Nota: Saman ini tidak boleh diserahkan lebih dari 12 bulan dari tarikh di atas kecuali ianya dilanjutkan oleh perintah mahkamah.
- E** Jika defendan tidak menghadiri sendiri atau melalui peguamcaranya pada masa dan tempat yang dinyatakan di atas, perintah boleh dibuat terhadap atau berhubung dengan defendan sepertimana yang difikirkan sesuai dan munasabah oleh mahkamah ini.
- F** Lord Denning MR in *Punton & Anor v Ministry of Pensions and National Insurance* [1963] 1 All ER 275 rightly pointed out that an originating summons remains a sensible and modern way of obtaining a declaration or determination of a point of law. NH Chan JCA in *Saraswathy Devi a/p Nadchatiram v Vijayalakshmi Devi a/p Nadchatiram* [1998] 1 MLJ 89 had this to say of O 7 r 3 of the RHC at p 95 of the report:
- G** Order 7 r 3 of the Rules of the High Court 1980 ('the RHC') provides that every originating summons must include a statement of the questions on which the plaintiff seeks the determination or direction of the High Court or a concise statement of the relief or remedy claimed with sufficient particulars to identify the cause or causes of action in respect of which the plaintiff claims that relief or remedy.
- H** The instant originating summons does not contain any details of the questions on which Vijayalakshmi is seeking the court's determination or direction nor does it contain sufficient particulars so as to show what her cause of action is in respect of which she is asking relief or remedy. Merely asking the court for an injunction against Saraswathy and her firm from acting in the four remaining civil suits under the Legal Profession Act 1976 or under its
- I** Rules is not enough. The originating summons must show why she or her firm should not act in the proceedings. Since this is not shown, no cause of action is disclosed in the originating summons against Saraswathy. On this ground alone, the originating summons ought to have been dismissed.

At p 96 of the report, his Lordship NH Chan JCA continued and likened an originating summons with a statement of claim in these words:

So that an originating summons is just like a pleading in a statement of claim, it must contain a concise statement of the relief or remedy claimed with sufficient particulars to identify the cause of action in respect of which the relief or remedy is claimed. In other words, an originating summons, like a statement of claim, must disclose a cause of action. Therefore, if the summons itself, as in the instant case, does not disclose any cause of action, it can be dismissed.

In *Platinum Heights Sdn Bhd v Sun Mix Concrete Sdn Bhd* [1997] 1 MLJ 409, Kamalanathan Ratnam JC (as he then was) in the context of O 7 r 3(1) of the RHC said at p 417 of the report:

However, this originating summons filed by the plaintiff did not contain any such statement of questions for the court's determination or direction nor was there a concise statement of the relief or remedy claimed and neither was there a statement with sufficient particulars to identify the cause or causes of action in respect of which it wishes to claim that relief or remedy, but merely contained the prayers it wished for as follows:

- (a) Penentang dilarang memfailkan dan/atau meneruskan petisyen penggulangan terhadap pemohon hingga perintah lanjutan.
- (b) Ganti rugi ditaksir oleh penolong kanan pendaftar.
- (c) Kos dalam kausa.
- (d) Apa-apa relief lain yang dianggap munasabah oleh mahkamah.

The above originating summons does not disclose a cause of action. There is no substantive issue for the court's determination. Had the court granted the injunction, the injunction would have been to preserve the status quo of the parties pending the determination of the substantive issue or cause of action. If indeed the debt is being disputed on substantial grounds, some effort ought to be made to state it in more detail with sufficient particulars. As it stood, there appears to be no substantive cause of action. Apart from the injunction, what other order could this court make bearing in mind that the relief prayed for is an injunction to prevent the defendant from filing a winding-up proceeding until further order.

Nik Hashim JC (as he then was) in *Dr Woo Kin Chong v Mary Ou Holdings Sdn Bhd* [1998] 2 MLJ 167, dealt with a preliminary objection in regard to the failure of the applicant to comply with O 69 r 4(2) of the RHC by not stating the grounds of the application in general terms on the notice of motion and this was what his Lordship said at p 172 of the report:

In my view, a motion under O 69 r 4 of the RHC is synonymous to an appeal. Order 69 r 4(2) is a special provision relating to an application to remit or set aside an award of an arbitrator. By its terms, the provision under the rule is mandatory and therefore obligatory. That being so, strict compliance with its provision is called for (*Ooi Chew Seng's case*). Accordingly, the notice of motion must contain the grounds. This is a basic requirement. The grounds must be stated within the four corners of the notice itself. Affidavit is not a ground, but it contains evidence. It is a separate document from the notice and its purpose is to verify the facts in the grounds. The affidavit cannot supply the missing grounds which are required to be set out in the notice of motion under r 4(2) of O 69 of the RHC. The rule requires only grounds in general terms to be stated in the notice itself. The notice without the grounds is incomplete and irregular. An incomplete notice is as good as no notice at all.

A With respect, all these cases can readily be distinguished as the intitlements and the reliefs prayed for were inadequate and lacking in specifics. Here, the intitlement brought into sharp focus O 84 of the RHC; ss 77, 88 and 93 of the Law Reform (Marriage And Divorce) Act 1976; ss 3, 5, 10 and 11 of the Guardianship of Infants Act 1961; and s 3 of the Married Women and Children (Maintenance) Act 1950. Order 84 of the RHC states that where there is pending an action or other proceedings by reason of which an infant is a ward of court, any application under the Guardianship of Infants Act 1961 with respect to that infant may be made by summons in the proceeding, but except in that case any such application must be made by originating summons. The plaintiff here proceeded by way of an originating summons and she rightly invoked the Guardianship of Infants Act 1961 as that Act was applicable to her. It is germane to mention that the Guardianship of Infants Act 1961 does not apply to persons professing the religion of Islam. In my judgment, there was no reason at all to dismiss the plaintiff's application in encl 5 as it was filed by way of an originating summons (*V Solai v Mariayee* [1954] MLJ 256). Looking at encl 5, a concise statement of the relief claimed in the proceedings begun by originating summons with sufficient particulars to identify the cause of action had been fulfilled by the plaintiff thereby falling within the ambit of O 7 r 3(1) of the RHC. As Gopal Sri Ram JCA once remarked in *Cheow Chew Khoo (t/a Cathay Hotel) v Abdul Johari bin Abdul Rahman* [1995] 1 MLJ 457 at p 477:

E In my judgment, this matter, which is a point of practice and procedure, is to be resolved by reference to the fundamental principle that a party must not take his opponent or the court by surprise. It is my opinion that an originating process requiring an intitlement must state, with sufficient particularity, either in its heading or in its body, the statute or rule of court under which the court is being moved: otherwise it would be an embarrassing pleading and may be liable to be struck out, unless sooner amended.

F

Without a doubt, these words ring true in the present case. The intitlement of the originating summons in encl 5 stated with sufficient particularity the statutes which it relied upon to move this court and it was certainly not an embarrassing pleading as to warrant its dismissal. At this juncture, it would be ideal to refer to the case of *R Saraswathy v R Palakrishnan* [1986] 2 MLJ 127, a decision of the then Supreme Court delivered by Wan Suleiman SCJ. The appellant there had claimed custody of her infant son under s 88(3) of the Law Reform (Marriage and Divorce) Act 1976 as well as maintenance for him under s 93(1) of the Act from the respondent, her husband. The parties had separated and the appellant and her son were living separately from the respondent in her parents' home. There was no pending action for divorce between the parties. The learned judge held that as there was no pending action for divorce neither s 88(3) of the Law Reform (Marriage and Divorce) Act 1976 nor s 93(1) of the Act can be invoked. It was held that both on procedure and on the merits the application should be dismissed. The appellant appealed. On appeal, his Lordship Wan Suleiman SCJ held that the three Acts (Law Reform (Marriage and Divorce) Act 1976, the Guardianship of Infants Act 1961

and the Married Women and Children (Maintenance) Act 1950) were all applicable depending on the circumstances of a particular case and in the state of affairs surrounding that appeal, the application under s 88(3) of the Law Reform (Marriage and Divorce) Act 1976 was properly made. There would be no need for the parties to wait until perhaps the unlikely event of their commencing a divorce action before making such an application. It is germane to mention that r 102(1) of the Divorce and Matrimonial Proceedings Rules 1980 would save the day for the plaintiff. That rule states that non-compliance with these rules, meaning the Divorce and Matrimonial Proceedings Rules 1980 or any rule of practice in force, shall not render the proceedings void unless the court shall so orders but the court may, on its own motion or on application of any party, set aside any proceedings wholly or in part as irregular or order amendment on such terms as may be just. Rule 102(2) of the Divorce and Matrimonial Proceedings Rules 1980 states that any such application may be dismissed unless made within a reasonable time and before the applicant has taken any step in the proceedings with knowledge of the irregularity. Here, there was no application by the defendant to set aside encl 5 wholly or in part as irregular. That being the case, this court is constrained to accept encl 5 wholly.

I will now proceed to the second part of the defendant's preliminary objection and this relates to the purported contravention of O 7 r 2(1) of the RHC which states that every originating summons must be in Form 6, 7 or 8, whichever is appropriate. Basically, the defendant contends that the originating summons in encl 5 had not followed the correct form in that the plaintiff should have filed an originating summons requiring an appearance in Form 6 and not an originating summons which does not require an appearance in Form 7. The defendant further contends that the usage of Form 7 by the plaintiff has deprived the defendant of the opportunity of counterclaiming as provided for under O 28 r 7 of the RHC. This contention fails to take into account that the originating summons in encl 5 is in regard to a proceeding relating to an infant boy and it is basically governed by O 84 of the RHC. It is of crucial importance to note that O 84 of the RHC merely states that when there is no pending action in respect of an infant, any application must be made by way of an originating summons. It is totally silent on which type of originating summons that must be used. That being the case, the plaintiff was free to select either Form 6 or Form 7 and obviously the plaintiff here has chosen Form 7 which did not require an appearance. The plaintiff was perfectly entitled to make a choice and a certificate of urgency was also filed as reflected in encl 2 imploring the court for an early date. Now, an originating summons without an appearance as in Form 7 allows the Registrar to fix a date for the hearing of the originating summons upon sealing of the same. On the other hand, an originating summons with appearance as in Form 6 will have to go through the cumbersome procedures as set out in O 28 r 2(1) of the RHC before a hearing date is given. As a matter of practice, an originating summons without appearance is almost invariably filed by legal practitioners in Johor Bahru for an expeditious hearing of an originating summons in respect of custody applications involving infants. Thus, the plaintiff in filing encl 5 was perfectly correct in adopting that mode of procedure. Even if I am wrong in

A holding that encl 5 did not contravene O 7 r 3(1) of the RHC and O 7 r 2 of the RHC, that non-compliance can be said to be a mere irregularity curable by O 2 r 1 of the RHC and O 92 r 4 of the RHC. As Gopal Sri Ram JCA succinctly said in *Khor Cheng Wah v Sungai Way Leasing Sdn Bhd* [1996] 1 MLJ 223 at p 230:

B Previously, courts, in respect of their process and orders, maintained a distinction between irregularities and nullities. The former were curable, but the latter were not. This distinction did not lend much clarity to the law. Neither did it, in the preponderance of cases, advance the course of justice.

C After the coming into force of the Rules of the High Court 1980, the distinction between irregularities and nullities ceased to exist. All acts and omissions that amount to non-compliance with one or more of the rules of court result in their being curable irregularities and not nullities. Indeed it is quite inappropriate to say of an order or decision of a court of unlimited jurisdiction (such as the High Court and other superior courts) that it is a nullity.

D Edgar Joseph Jr J (now FCJ) in *Rohana bte Ariffin v Universiti Sains Malaysia and another application* [1988] 2 MLJ 609 applied vigorously O 2 r 1(1) of the RHC to condone the breach of O 53 r 2(4) of the RHC and this was what his Lordship said at pp 611 to 612 of the report:

E If, contrary to my primary opinion, I was wrong in the view I had taken regarding this part of the case, and there had been a breach of O 53 r 2(4), then, having regard to the circumstances, especially the fact that the respondent had suffered no prejudice, I condoned the breach by virtue of the powers conferred upon me by O 2 r 1(1).

F In *Re CHS* [1997] 3 MLJ 152, the proceedings should have been commenced by way of an originating summons but instead the plaintiff proceeded by way of an originating motion. Augustine Paul JC (as he then was) was of the view that since nobody was prejudiced and based on the justice of the case and the urgency of the matter, the originating motion was treated as an originating summons.

G It is a correct statement of the law to say that every omission or mistake in practice or procedure should be regarded as an irregularity which the court could and should rectify so long as it would not cause an injustice. Mohamed Dzaidin J (now FCJ) in *Perbadanan Pembangunan Pulau Pinang v Chong Ah Yok* [1993] 2 CLJ 351 rectified an omission to strictly follow Form 8A of the RHC as curable under s 62 of the Interpretation Act 1967 and his Lordship's decision was confirmed by the (then) Supreme Court.

H The defendant has contended that he was prejudiced by the existence of encl 5 as he was deprived of the right to counter claim. But a perusal of encl 7, which is an affidavit in reply of the defendant, puts to rest the contention of the defendant once and for all. By para 29 of encl 7, the defendant has conveniently counterclaimed for the custody of the boy. In my judgment, there was no prejudice or injustice sustained by the defendant when the plaintiff filed the originating summons in encl 5. Indeed, if the defendant

I feels that he was prejudiced by the existence of encl 5 he could have timeously applied to have it set aside. But alas, this was not done. Instead, the defendant responded by filing lengthy affidavits and these must be construed as taking a fresh step as envisaged under O 2 r 2(1) of the RHC.

Likewise in the case of *Malayan United Finance Bhd v Sun Chong Construction Sdn Bhd & Ors* [1995] 4 MLJ 741, Richard Talalla J ruled that the respondent had breached O 2 r 2(1) of the RHC when he failed to make his application to set aside the judgment for irregularity within a reasonable time and instead took fresh steps by entering an appearance and filing a defence well after becoming aware of the alleged irregularity. At best, the non-compliance by the plaintiff was a mere inadvertence and was not calculated to prejudice the defendant. This way my judgment and I so hold accordingly.

Finally, I will now proceed to the third preliminary objection of the defendant. It is the contention of the defendant that the High Court of Johor Bahru is not the proper and convenient forum to hear the originating summons in encl 5. Lim Beng Choon J in the case of *Sova Sdn Bhd v Kasih Sayang Realty Sdn Bhd* [1988] 2 MLJ 268 held, *inter alia*, that a High Court located at Penang or at Alor Setar is but a branch of the High Court in Malaya and each branch of the High Court in Malaya located in any state has concurrent jurisdiction to entertain any civil proceedings regardless of whether the cause of action arose in another state. Here, the originating summons in encl 5 was filed on 10 June 1998 in the registry of the High Court of Johor Bahru. At the material time too, the plaintiff and the infant were already residing in Johor Bahru and consequently, it was quite logical for the plaintiff to commence proceedings in the High Court of Johor Bahru. I have deliberated at some length and I am constrained to hold that in the interest of the parties and for the ends of justice, always mindful of the nature of the application, the High Court of Johor Bahru is the right forum to hear the originating summons in encl 5. I am fortified by the stand I take on the strength of the Supreme Court's decision in *American Express Bank Ltd v Mohamed Toufic Al-Ozeir & Anor* [1995] 1 MLJ 160 where Peh Swee Chin FCJ speaking for the Federal Court succinctly said (at p 167 of the report):

The doctrine of forum non conveniens appears to have originated in Scotland and has finally found full acceptance by the House of Lords in *Spiliada Maritime Corp v Cansulax Ltd (The Spiliada)* [1986] 3 All ER 843 after a series of decisions, as described and set out so well in that very interesting and readable joint article by RH Hickling and Wu Min Aun, 'Stay of Actions and Forum Non Conveniens' [1994] 3 MLJ xcvi.

The main judgment in *The Spiliada* was delivered by Lord Goff, who adopted the dictum of Lord Kinneer in *Sim v Robinow* (1892) 19 R (Ct of Sess) 655 at p 668 as being the fundamental principle in regard to this doctrine ie that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all parties and for the ends of justice. Lord Goff cautioned that the word 'conveniens' in forum non conveniens meant suitability or appropriateness of the relevant jurisdiction and not one of convenience. We are in entire agreement with the fundamental principle so expressed.

That the High Court of Johor Bahru has the jurisdiction to hear encl 5 cannot be disputed. In *Wee Chow Yong t/a Viena Music Centre v Public Finance Bhd* [1989] 3 MLJ 508 at p 512, Edgar Joseph Jr J (now FCJ) said that:

A The case of *Sova Sdn Bhd v Kasih Sayang Realty Sdn Bhd* [1988] 2 MLJ 268 reminds us of the familiar proposition that the High Court of each state in our country are but branches of the High Court of Malaya and that each branch has concurrent jurisdiction to entertain any civil proceeding regardless of whether the cause of action arose in another state.

B In any event, the defendant has yet to take the necessary steps under s 20 of the Courts of Judicature Act 1964 to transfer the case to the High Court of Seremban. Now, s 20 of the Courts of Judicature Act 1964 provides that the distribution of business among the judges of the High Court is at the direction of the Chief Judge (*Chong Siew Choong v PP* [1996] 5 MLJ 65). It goes without saying that there can be no appeal against any direction given by the Chief Judge. By merely raising a technical objection would be inadequate and insufficient. It must be borne in mind that there was delay occasioned by the defendant's omission to transfer the case to the High Court of Seremban under s 20 of the Courts of Judicature Act 1964. That kind of omission was indeed prejudicial to the plaintiff's originating summons in encl 5 bearing in mind the nature and urgency of that application. An application under the Guardianship of Infants Act 1961 generally provides for the guardianship, custody, rights and liabilities of the guardian of infants as well as control and management of the infants property. In the context of encl 5, the originating summons merely seeks for guardianship, care, control and custody of a boy aged one year eight months together with maintenance of RM500 for that boy. Thus, any further delay would be extremely prejudicial to the infant boy.

E Reverting back to the case of *Sova Sdn Bhd v Kasih Sayang Realty Sdn Bhd*, factually it can readily be distinguished since that case involved a trial where witnesses would invariably be called to testify as opposed to the application in the originating summons of encl 5 that can be effectually determined by affidavits. For these reasons, I have no hesitation in dismissing the defendant's preliminary objections with costs.

F For the sake of expediency, the hearing of the originating summons in encl 5 was fixed for hearing on 1 December 1998.

G *Allowing the plaintiff's preliminary objections and dismissing the defendant's preliminary objections.*

Reported by Jafisah Jaafar

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